**Episode 61: The Attorney General**

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***[Virginia Prescott] I'm Virginia Prescott and this is Civics 101, the podcast refresher course on the basics of our democracy.***

***Who does the U.S. government call when it needs a good lawyer? Today a briefing on the highest legal office in the land: the Attorney General of the United States. What does it mean to practice law in the executive branch? And who, exactly, does the Attorney General represent? David Yalof joins us today. He's professor of political science at the University of Connecticut. David, welcome to Civics 101.***

[David Yalof] Thanks for having me.

***[VP] Let's start with the job description. What are the main roles of the Attorney General of the United States?***

[DY] Well, the Attorney General is both the chief law enforcement officer of the United States -- he or she is also the chief lawyer of the United States and of course those titles come with them lots of responsibilities. But when it comes to prosecuting law, when it comes to defending the U.S. government, it all ultimately ends up before the Attorney General.

***[VP]When was the office of the Attorney General established and why?***

[DY] Interestingly enough, it was established by statute not by the Constitution. The Judiciary Act of 1789, one of the first laws passed by Congress, created the Office of an Attorney General and basically its main purpose was to create someone who would prosecute on behalf of the U.S. government. Federal laws that might be broken, but also to provide advice to the president of the United States and to others the president the United States might deem needing advice.

***[VP] Why is the Attorney General a member of the executive branch and not the judicial branch?***

[DY] Well, most times prosecutors in particular are part of the executive branch and that's because if you think about the nature of what a prosecution is you're taking a law and you are executing it, in essence against, or applying it to certain people. There can be no more central executive function than that, so almost in every state and certainly in the case of the federal government, the Attorney General or anybody who prosecutes laws is considered part of, and must be considered part of, the executive branch.

***[VP] Who appoints the Attorney General?***

[DY] In the case of the federal government, it is appointed by the President of the United States and then confirmed by the Senate. And so, very often, you will have an Attorney General serve from the beginning of a president's term until whatever point that person decides to leave or is dismissed. And there's almost always a new Attorney General when there is a new President of the United States.

***[VP] So the Attorney General is also the head of the Department of Justice, correct?***

[DY] That is correct.

***[VP] So why not call it the secretary?***

[DY] You could call him a Secretary of Justice if you wanted to, and that might make things more consistent, but because the Judiciary Act of 1789 called it – expressly -- the Attorney General, that's where we stand.

***[VP] Who is the Attorney General in charge of? States Attorneys General, judges?***

[DY] Neither. The Attorney General is not in charge of the state attorneys general. Those individuals, depending upon the rules of individual states, might report to the governor or somebody else and certainly not judges. Judges decide cases, ultimately weigh in on prosecutions. Especially those that go to trial and so from that standpoint, neither.

The only person or institution that the Attorney General theoretically reports to is the President the United States who appointed him or her.

***[VP] Would the Attorney General have sway over federal judicial appointments or states attorneys general?***

[DY] Great question, and the answer is that it's up to the President the United States. Some presidents have heavily relied on the Attorney General for advice on who to appoint to lower courts and who to appoint to the Supreme Court. Gerald Ford and Ronald Reagan both heavily relied on their attorneys general. We also have examples of presidents of the United States who really did not consult at all or in very limited ways with the Attorney General and President Bill Clinton would be an example of that. So it's completely up to the president of the United States to decide how to use his Attorney General in that kind of advisory capacity.

***[VP] But does the Attorney General advise the president?***

[DY] Well, yes and no. Unfortunately, no clear answers there. He or she is the chief law enforcement officer and certainly provides advice for the President in terms of what laws might be broken and what the procedures might be. But when we're talking about, let's say, personal advice, if the President is looking for advice not about the U.S. government, per se, about his own status, whether he could be sued individually, not as president the United States, at that point you would have something called conflicting loyalties. The Attorney General would probably recommend that the President hire a personal attorney under those kinds of circumstance.

***[VP] So the Attorney General is not the President's lawyer… it's the lawyer for the United States.***

[DY] That's correct. But of course being the lawyer for the U.S. government basically makes you lawyer for the President of the United States in many different capacities. If the President is sued in his capacity as president, for example, somebody decides to sue the U.S. government and names the president, today that would be Donald Trump, for violating some kind of law, in that sense the U.S. Attorney General would absolutely be in charge of the Department of Justice, and thus be technically responsible for defending the U.S. government.

However if somebody decided to sue the president personally… for example, President Bill Clinton was sued personally by Paula Jones for acts that happened before he was President of the United States, the Attorney General would play no role at all in that.

***[VP] Would the Attorney General prosecute the President if the President broke federal law?***

[DY] It's a fantastic question, and the answer is no because at that point the conflicting loyalties would be overwhelming.

Consider that the Attorney General is appointed by the United States and can be terminated by the United States virtually at will. It doesn't even have to be because from that standpoint if the President violated the law of the United States, and if the U.S. Attorney General determined that almost, always the Attorney General would not be an appropriate person to handle that because of his or her conflicting loyalty. And so that's when you would hand it off to a lower level person or more likely even a special prosecutor of some sort.

***[VP] So what does it mean for the Attorney General to be the country's chief law enforcement officer? Could the Attorney General place people, say government officials, under arrest or order investigation?***

[DY] The Attorney General could do that and has done that on occasion in United States history when there is a clear violation of a federal law. Again you do have potential conflicting loyalties. It's not something that the Attorney General would be very comfortable with because he probably or she probably has served with that person. But yes in the event of almost anybody other than the president who the Attorney General reports to violating the law in theory the Attorney General would be the person who would decide on the prosecution the nature of the prosecution and the like.

***[VP] How about as the government's attorney? Would the Attorney General defend individual government employees, for example, if they were sued? You know, representing the government like a corporate lawyer might represent a company.***

[DY] Well, you know, the corporate lawyer analogy is not a bad one. If you were suing the U.S. government you would name the U.S. government, you might name a particular secretary or a particular official who had basically executed the action that you are suing over. If that's true than the Attorney General and the Justice Department would have responsibility and their attorneys would be responsibility for defending the actions of the U.S. government.

On the other hand, if the secretary or an official was sued personally just like if a corporate officer was sued personally for something that is outside of his or her duties as an officer, then it would be inappropriate for the U.S. Attorney General to engage in that kind of defense.

***[VP] I'm trying to think of an example like I'm thinking Hamdi versus Rumsfeld. This was a case that made it to the Supreme Court about military commissions at Guantanamo Bay. So that was Secretary of Defense Rumsfeld at the time. So the Attorney General is representing the government in that case?***

[DY] Excellent example. Yes. The Attorney General in that case would be representing the U.S. government. Donald Rumsfeld as Secretary of Defense was sued but he was sued in his capacity as Secretary of Defense because, for example, he was responsible for enforcing certain actions under the USA Patriot Act in that circumstance and an individual who had been detained, he felt illegally, was suing the U.S. government there. It would make all the sense in the world.

But, for example, if Donald Rumsfeld was sued by an ex-wife for not providing alimony payments, for example, that would have nothing to do with the duties of the Secretary of Defense. No official capacity. And in that case the Attorney General obviously would not defend Donald Rumsfeld.

***[VP] Does the Attorney General have any influence over federal law or the interpretation of federal law?***

[DY] Well the answer is yes because for example the solicitor general the third ranking official in the U.S. Department of Justice is the one who argues in the U.S. Supreme Court on behalf of the United States. He reports to the Attorney General and thus indirectly reports to the president.

And so the solicitor general's office will take positions on all manner of federal laws how they should be interpreted and those decisions and the way they decide to argue that it does report to the Attorney General and thus to the president so that the Attorney General will have indirect and sometimes quite direct influence on the way the U.S. government decides to advocate that judges apply or interpret law in a sense they're not actually interpreting the law but they are with their decisions to prosecute having that impact in essence.

***[VP] OK so how about in policy? So, say the President wants something done. The Attorney General could reflect those wishes in lawsuits or how could the Attorney General reflect that kind of policy initiative?***

[DY] Well so for example Barack Obama was very interested in broadening the application of civil rights laws applying them to new types of violations that had not been prosecuted before for example discrimination against trans individuals would be the classic example. And so the Attorney General Eric Holder for most of Barack Obama's presidency and Loretta Lynch at the end those individuals would take the policy interests and initiatives of the president then Obama and apply it by prosecuting different types of individuals who are violating those rules. Under President

Trump he would inform or advise his U.S. Attorney General Jefferson sessions that he does not want let's say that broad an application of civil rights laws. So in that way the Attorney General would be impacting by basically advocating or executing the policy that comes from the president of the United States.

***[VP] Any examples historically of the Attorney General working on behalf of the President perhaps in a conflict of interest?***

[DY] Well it's ultimately up to the U.S. Attorney General and the President to determine what constitutes a conflict of interest or a conflict of interest laws. But they have to be interpreted and applied there are always going to be close calls. So sometimes the U.S. Attorney General will go forward even if there's a potential conflict. We saw that in 1996 when it was Janet Reno the Attorney General who decided not to apply a special prosecutor and herself handle allegations made against the vice president of the United States than Al Gore. There were accusations that he had committed some campaign finance violations a violation of federal law and so she was handling that case. There were people in Congress and elsewhere that felt that that was a violation of a conflict of interest that she had mixed loyalties in that sense but she disagreed and handled that case.

***[VP] In a more recent example, Jeff Sessions did recuse himself from supervising a review of a campaign in which he played a prominent role. This is an investigation about interference or possible Russian interference in the 2016 election. Not in agreement with the President in this case and recusing himself.***

[DY] Very much not in agreement. And we've learned since then that there have been quite a few loud arguments between the Attorney General and the president the United States over that decision. It should be said that the United States could have fired Jefferson's sessions can do so at any time could do so tomorrow over that or over just about anything else and that kind of decision to fire an executive branch employee is virtually unreviewable because the Supreme Court has said in many cases that that is absolutely at the discretion of the President United States he decided to maintain or keep Jeff Sessions either because he liked the job he was doing elsewhere or because he thought there'd be too much political fallout. But either way you're right. That's an example where there was a disagreement over those kinds of conflicts of interests.

***[VP] We haven't talked much about criminal justice in the U.S. -- does the Attorney General oversee federal prisons?***

[DY] Yes the Bureau of Prisons and the director of the Bureau of Prisons Both are located within the Justice Department and report directly to the U.S. Attorney General. So in that sense yes they are part of the Department of Justice.

***[VP] Are there examples of the office being misused like an Attorney General being charged with abuse of power or improper exercise of power?***

[DY] Well sure. There was an accusation of that kind in the second term of George W. Bush's administration in early 2005 after George W. Bush secured reelection. His Attorney General Alberto Gonzales decided to go forward and fire a bunch of U.S. attorneys. And the decision to do so was made ostensibly for political reasons. These individuals were not Republican enough or whatever. Certainly those kinds of decisions are questionable, do create a lot of interest on the part of others because we like to think of U.S. attorneys as virtually nonpolitical in their judgments and in their offices and so when that happened Congress actually opened up an inquiry because there was a fear that he had abused his office

***[VP] David, a lawyer might be considered good if they tend to win cases. What makes a good Attorney General of the United States?***

[DY] That's a fantastic question and it's a little bit in the eye of the beholder. There are many people who believe that the job of the U.S. Attorney General in modern American politics is to do the bidding of the president of the United States and to that extent if the president has certain policies that he is pushing let's say about the prosecution for civil rights violations or the prosecution of just about anything if those policies are set forth by the White House and the Justice Department dutifully follows that that might be considered a successful Attorney General. There are others who believe that the Attorney General must act with a tremendous amount of independence after being appointed and that a successful Attorney General is somebody who successfully balances the need to enact and implement the president's policy agenda with the need to maintain a certain level of nonpartisanship and objectivity in making fundamental decisions about enforcing the laws of the United States so that there might be a little disagreement even presidents might disagree on what constitutes a successful Attorney General.

***[VP] David, thank you very much for speaking with us.***

[DY] Thank you so much for having me. It was a pleasure.